FILED ENTERED RECEIVED SERVED ON
COUNSEL/PARTIES OF RECORD
JUL [illegible] 2007
CLERK US DISTRICT COURT
DISTRICT OF NEVADA
BY: DEPUTY

ALVERSON, TAYLOR,
MORTENSEN & SANDERS
KURT R. BONDS, ESQ.
Nevada Bar #6228
STEPHEN M. DIXON, ESQ.
Nevada Bar #10025
7401 W. Charleston Blvd.
Las Vegas, NV 89117
(702) 384-7000
Attorneys for Defendant
SUNSHINE MILLS, INC.

BEFORE THE
JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

-*-

IN RE PET FOOD PRODUCTS LIABILITY LITIGATION

2:07CV682-PMP-LRL
M.D.L.-1850

Picus v. Wal-Mart Stores, Inc., et al., Nev. Case No. CV-S-00682-PMP-LRL

BRIEF IN SUPPORT OF DEFENDANT SUNSHINE MILLS INC.'S MOTION TO VACATE CONDITIONAL TRANSFER ORDER

Defendant Sunshine Mills, Inc., submits this Brief in Support of its Motion to Vacate Conditional Transfer Order (hereinafter "CTO") pursuant to the Rules of Procedure of the Judicial Panel on Multidistrict Litigation Rule 7.4(d). Defendant requests that the Panel vacate its CTO and remand the above referenced case to the United States District Court for the District of Nevada.

I.

BACKGROUND

This matter was originally filed by Plaintiff Picus in the Eighth Judicial District Court of the State of Nevada, Clark County, on April 30, 2007. Said class action was filed by Plaintiff Picus alleging the mislabeling of pet food products as "MADE IN USA" which is prohibited under Nev. Rev. Stat. § 598.095 and Nev. Rev. Stat. § 41.600. Plaintiff asserts three causes of action 1) violation of the Nevada unfair competition statute Nev. Rev. Stat. § 41.600 *et seq.*; 2)

ALVERSON, TAYLOR, MORTENSEN & SANDERS
LAWYERS
7401 WEST CHARLESTON BOULEVARD
LAS VEGAS, NEVADA 89117-1401
(702) 384-7000

ALVERSON, TAYLOR, MORTENSEN & SANDERS
LAWYERS
7401 WEST CHARLESTON BOULEVARD
LAS VEGAS, NEVADA 89117-1401
(702) 384-7000

unjust enrichment; and 3) common law fraud. Plaintiff's complaint alleges that Defendant intentionally misled consumers into purchasing Ol' Roy brand pet food products by labeling its products "MADE IN USA" when not all ingredients were of domestic origin. Plaintiff's Complaint at Paragraphs 29-30. Furthermore, Plaintiff claims that Defendant committed fraud by failing to disclose the foreign origin of ingredients. Plaintiff's Complaint at Paragraph 38. Lastly, Plaintiff claims the Defendant was unjustly enriched when it allegedly profited from deceptive labeling. Plaintiff's Complaint at Paragraph 46.

On or about May 25, 2007, Defendant Wal-Mart Stores, Inc. Filed its Notice of Removal followed by Defendants Del Monte Foods Company and Chemnutra, Inc. on May 28, 2007 and May 29, 2007, respectively. The case was removed to the United States District Court for the District of Nevada on April 25, 2007. On or about June 28, 2007, a Conditional Transfer Order was entered by this Panel ordering the transfer and consolidation of the Picus action with numerous pending civil actions under the common fact that all actions were based on tainted pet food products:

> "All actions stem from the recall of pet food products allegedly tainted by melamine found in wheat gluten imported from China and used in these products. Centralization under Section 1407 is necessary in order to eliminate duplicative discovery; avoid inconsistent pretrial rulings, especially with respect to class certification; and conserve the resources of the parties, their counsel and the judiciary."

In re Pet Food Prods. Liabl. Litig., 2007 U.S. Dist. LEXIS 45540 at 3-4 (J.P.M.L. June 19, 2007).

Plaintiff Picus and Defendants subsequently filed their notices of opposition to said Conditional Transfer Order on July 13, 2007. All parties are in agreement that consolidation is inappropriate as there exist substantial factual differences between the present case and the MDL cases. Additionally, Plaintiff and Defendants concur that discovery in the products liability MDL cases will have little or nothing in common with the relevant discovery in the present case. Defendant Sunshine Mills, Inc., hereby files its Notice of and Opposition to Conditional Transfer Order (CTO-1) filed by the Judicial Panel on Multidistrict Litigation on June 28, 2007, in regard to *Picus v. Wal-Mart Stores, Inc., et al.*, Case No. CV-S-00682-PMP-LRL District of Nevada.

ALVERSON, TAYLOR, MORTENSEN & SANDERS
LAWYERS
7401 WEST CHARLESTON BOULEVARD
LAS VEGAS, NEVADA 89117-1401
(702) 384-7000

II.

LAW AND ARGUMENT

There are three statutory prerequisites for transfer and consolidation of cases under 28 USC Section 1407(a). First and foremost, the actions to be transferred and consolidated must involve common issues of fact. 28 USC Section 1407(a) provides for consolidation of "civil actions involving one or more common questions of fact." Second, consolidation of the actions must benefit the convenience of the parties and witnesses. *Id.* Third, consolidation must "promote the just and efficient conduct of the action." *Id.* The Jurisdictional Panel on Multidistrict Litigation has the authority to separate any claim, cross-claim, counter-claim, or third-party claim from the others. *Id.* In such a case, the Panel may vacate its CTO when any party shows good cause for it to do so. *In re Multidistrict Commodity Credit Corp. Litig. Involving Grain Shipments,* 319 F. Supp. 533, 534 (J.P.M.L. 1970). A party shows good cause to vacate when the cases do not share sufficient questions of law or fact. *In re Tri-State Water Rights Litig.*, 481 F. Supp.2d 1351, 1353 (J.P.M.L. 2007).

A. THERE ARE NO COMMON QUESTIONS OF FACT THAT SUPPORT CONSOLIDATION OF THIS ACTION WITH THE PREVIOUS MDL ACTIONS

A Panel ordering consolidation of actions must find common questions of fact that support its decision in accordance with 28 USC Section 1407(a). No common questions of fact exist between Plaintiff Picus's case and the other MDL actions. In its original Transfer Order, this Panel found that the MDL and present case both involved common questions of fact regarding tainted pet food. (Exhibit A). The commonality of facts ends with the consumers' purchase of Ol' Roy brand pet food products. The facts surrounding each case's allegations differ so drastically that discovery will need to be specific to each case and prove to be of little or no benefit to the parties of another case.

The present case has fundamentally unique issues of fact which are not relevant to the MDL cases. The MDL cases alleges injury to a pet resulting from the Defendant's pet food. Thus, they concern products liability issues. On the other hand, the present case concerns issues of consumer fraud and asks the question of whether Defendant was permitted by law to label the

ALVERSON, TAYLOR, MORTENSEN & SANDERS
LAWYERS
7401 WEST CHARLESTON BOULEVARD
LAS VEGAS, NEVADA 89117-1401
(702) 384-7000

pet food "MADE IN THE USA". In ruling upon this issue, a Court outside of Nevada would be required to apply Nevada consumer protection law. Finally, the classes of Plaintiffs in the present case differ from those in the MDL cases causing yet another divergence of common facts. The present class would include all consumers of Ol' Roy pet foods since the product has been sold. These consumers have not necessarily lost a pet as a result of contaminated pet food. Alternatively, the MDL classes only include consumers of Ol' Roy pet food during a specified period of time in which contamination occurred. These consumers must have incurred the loss of a pet as a result of the contamination.

As the issues of fact are uncommon among the present and MDL cases, there is no benefit to consolidation. The differing causes of action require unique discovery and legal analysis. Failure to vacate the CTO could actually hamper the litigation of all cases involved.

B. THE CORE FACTUAL QUESTIONS MUST BE DEVELOPED SEPARATELY

The present case and the MDL cases concern fundamentally unique issues of fact which require separate development. Despite a surface-level factual similarity in the two lines of cases, the similarities run no deeper and warrant independence. See *In re Airline "Age of Employee" Employment Practices Litigation,* 483 F.Supp. 814, 816-17 (J.P.M.L. 1980) (refusing to transfer where allegations and defenses essentially similar but principal factual issues will be different to each).

The MDL cases concerning products liability all revolve around the issue of contamination and subsequent pet death. As a result, thee cases have a common issue of fact which will benefit from consolidated discovery and other judicial processes. On the contrary, the present case alleging deceptive trade practices in labeling the origin of pet food ingredients would not benefit or conserve resources by consolidation. The present case requires an examination into particular state consumer fraud laws and unique damages.

C. TRANSFER AND CONSOLIDATION WILL PROMOTE NEITHER THE JUST AND EFFICIENT CONDUCT OF THESE ACTIONS NOR THE CONVENIENCE OF THE PARTIES AND WITNESSES

///

ALVERSON, TAYLOR, MORTENSEN & SANDERS
LAWYERS
7401 WEST CHARLESTON BOULEVARD
LAS VEGAS, NEVADA 89117-1401
(702) 384-7000

In analyzing whether a consolidation and transfer would serve the just and efficient conduct of actions under 1407, the Panel must consider whether transfer and consolidation will avoid duplicative discovery and serve the convenience of the parties and witnesses. *In re TMJ Implants Products Liability Litig.*, 844 F.Supp. 1553, 1554 (JPML 1994). Numerous pretrial issues make this proposed consolidation highly detrimental and inconvenient to the parties. First, with little or no common discovery among the parties, there can be no common pretrial defense motions like summary judgment because the factual issues will be unique to each cases set of plaintiffs and corresponding defendants.

Consolidation will not decrease the discovery burden on the parties and witnesses. The cost of discovery will not be reduced because the present case requires unique witnesses, experts and discovery from the MDL cases. The parties and witnesses involved in the present action are spread throughout the country, which again increasing costs exponentially. With no common issues of fact among the cases, the consolidation will not ease the burden of discovery.

D. CONSOLIDATION WILL NOT PROMOTE SUBSTANTIAL CONSISTENCY OR ECONOMY OF THE JUDICIAL SYSTEM

Third, Section 1407(a) requires that consolidation serves the just and efficient conduct of the action. *In re Air Crash at Washington D.C. on January 13, 1982*, 533 F.Supp. 1350 (J.P.M.L. 1982). This section specifically encourages the prevention of duplicative discovery and the conservation of party, counsel, and judicial resources. The Court in *Board of Trustees v. Worldcom*:

> "When remand motions in cases potentially subject to MDL consolidation raise unique issues of law or fact, channeling the decisions to a single court would result in little or no savings of judicial resources. The threat of inconsistent judgments in either case is de minimis." *Board of Trustees v. Worldcom*, 244 F.Supp. 2d 900, 903 (N.D. Ill. 2002):

The consideration of the above requirements for consolidation will indicate that no efficiencies are to be gained by transferring the present action to MDL no. 1850. In fact consolidation may cause the opposite result, the expenditure of more resources than necessary. The MDL cases and present case share no common issues of fact, require individualized discovery, witnesses, and pretrial rulings, all of which make consolidation improper.

ALVERSON, TAYLOR, MORTENSEN & SANDERS
LAWYERS
7401 WEST CHARLESTON BOULEVARD
LAS VEGAS, NEVADA 89117-1401
(702) 384-7000

III.

CONCLUSION

Defendant Sunshine Mills respectfully submits that there exists sufficient cause for this Panel to vacate its Conditional Transfer Order. First, the policy of multi-district litigation is to reduce and simplify tasks of the court, parties, and witnesses. This consolidation furthers none of those policies and instead, complicates the litigation for all parties involved. Furthermore, the requirements for consolidation under 28 USC § 1407(a) are not met. There exists no common questions of facts, no joint discoverable issues which would benefit the convenience of the parties or witnesses, and no improvement upon the economy of the judicial system would occur as a result of the consolidation.

WHEREFORE, Sunshine Mills respectfully prays that this Panel vacate its Conditional Transfer Order and allow this matter to proceed in the venue where it originated.

DATED this 25 day of July, 2007.

ALVERSON, TAYLOR,
MORTENSEN & SANDERS

KURT R. BONDS, ESQ.
Nevada Bar #6228
STEPHEN M. DIXON, ESQ.
Nevada Bar #10025
7401 W. Charleston Blvd.
Las Vegas, NV 89117
Attorneys for Defendant
SUNSHINE MILLS, INC.

///

///

///

///

///

///

///

ALVERSON, TAYLOR, MORTENSEN & SANDERS
LAWYERS
7401 WEST CHARLESTON BOULEVARD
LAS VEGAS, NEVADA 89117-1401
(702) 384-7000

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 27TH day of June, 2007, service of the foregoing **BRIEF IN SUPPORT OF DEFENDANT SUNSHINE MILLS INC.'S MOTION TO VACATE CONDITIONAL TRANSFER ORDER** was made this date by depositing a true copy of the same for mailing, first class mail at Las Vegas, Nevada, addressed as follows:

Robert M. Gerard, Esq.
Lawrence T. Osuch, Esq.
GERARD & OSUCH, LLP
2840 South Jones Blvd.
Building D, Suite #4
Las Vegas, NV 89146

James E. Whitmire, III, Esq.
SANTORO, DRIGGS, WALCH, KEARNEY,
JOHNSON & THOMPSON
400 South Fourth Street, Third Floor
Las Vegas, NV 89101

Dawn Grossman, Esq.
COZEN O'CONNER
601 South Rancho Drive, Suite C-20
Las Vegas, NV 89106

Nicholas M. Wieczorek, Esq.
MORRIS POLICH & PURDY, LLP
3980 Howard Hughes, Pkwy., Suite 400
Las Vegas, NV 89169

Alan Westbrook, Esq.
PERRY & SPANN
1701 W. Charleston Blvd., #200
Las Vegas, NV 89102

and has been mailed to the Clerk of the district court where this action is pending as follows:

Clerk of the United States District Court
District of Nevada-Las Vegas
333 Las Vegas Blvd.
Las Vegas, NV 89101

And all parties on the attached Panel Service List.

An Employee of ALVERSON, TAYLOR,
MORTENSEN & SANDERS

N:\kurt.grp\CLIENTS\16900\16919\pleading\brief-motion to vacate cto.wpd